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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 210

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The petitioner, J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, prays that this Court

grant the writ of certiorari to review the judgment of the United States Circuit Court of Appeals, for the Seventh Circuit, entered April 22nd, 1939 (R. 112) affirming the decision of the United States Board of Tax Appeals (R. 91), which affirmed the determination by the Commissioner of Internal Revenue of a deficiency (R. 10) in federal estate tax against the Estate of Elizabeth S. Morgan, Decedent.

The petitioner, on January 23, 1936, filed his petition with the Board of Tax Appeals (R. 2), praying for a redetermination of a deficiency which resulted from the inclusion by the Commissioner, in the value of the gross estate of said decedent, of the value of certain property in respect of which the decedent held powers of appointment, which powers she had exercised by her last will and testament.

Elizabeth S. Morgan died May 3, 1933, a citizen of the United States and a resident of the City of Oshkosh, Winnebago County, Wisconsin. She left a will (R. 79) which was admitted to probate in the County Court of Winnebago County, Wisconsin, and J. Earl Morgan, petitioner, was duly appointed executor thereof (R. 75).

Isaac Stephenson, the decedent's father, died March 15, 1918, leaving a will dated June 15, 1916 (R. 38) and three codicils (not bearing on this case), the will providing in part for a trust (R. 41) for the benefit of decedent and other beneficiaries. The will and codicils were admitted to probate in the County Court of Marinette County, Wisconsin, on May 7, 1918 (R. 76). In his will the testator directed the trustees under the testamentary trust created in his will to divide his trust estate into nine equal parts. He provided that his daughter, Elizabeth S. Morgan, should receive from his trustees one-fourth of her part of his trust estate, at the end of four, eight, twelve and sixteen years, respectively, after his death (R. 48, 49). She duly received

such one-fourth of her part at the end of four, eight and twelve years, respectively. She died before the expiration of sixteen years after her father's death, and respondent for the purpose of this assessment of the estate tax included the last one-fourth of her part of the said testamentary trust estate in her gross estate (R. 11).

Isaac Stephenson, by his will, gave to the appointee or appointees of his daughter, to be appointed by her will, all the property remaining in her part of the trust estate at her death (R. 49). She exercised the above power by appointing in her will, her husband, J. Earl Morgan (R. 82), during his lifetime to receive the income of all the property in her part of the estate of her father remaining in the hands of his trustee at the time of her death.

The will of Isaac Stephenson further provided, that should his daughter, Elizabeth S. Morgan, die without issue without having by her will appointed a person or persons to receive her part of the property remaining in her father's testamentary trust at the time of her death, then her part of the trust estate should cease to exist, and all the property then remaining in such part should be distributed among the existing remaining parts. The testamentary trust under the will of Isaac Stephenson is not yet terminated.

His will further provided, that if she should die leaving issue, without having appointed such person or persons, then the income from the trust estate should be used by the trustees for the support of such issue, and upon the termination of the trust the principal should go to such issue, *per stirpes* (R. 49).

Isaac Stephenson on May 12, 1917, also executed a deed of trust (R. 13) which by its terms was to terminate twenty-one years after the death of the trustor and his wife

(R. 13). Isaac Stephenson died March 15, 1918. His wife, Martha E. Stephenson, died July 11, 1925. This Deed of Trust is still in full force and effect. It provided that Elizabeth S. Morgan, after the death of her father, should receive the income from a specified part of the trust property to be set apart for her by the trustees of the trust estate. If she should be living at the termination of the trust, she was to receive all of such part of such trust estate then in the possession of the trustees (R. 18). The deed of trust further provided that should she die prior to the termination of said trust, the trustees should pay the income from her part of the trust estate to the person or persons whom she might appoint by her last will and testament to receive such income during the term of the trust, and the principal upon the termination of the trust (R. 19).

By her will (R. 84, 85) she exercised the above power of appointment by appointing her husband, J. Earl Morgan, to receive during his lifetime the income of all the property embraced within the power, and after his death the principal to go to certain of her relatives.

The Commissioner for the purpose of assessment of the estate tax, included in the value of her gross estate the value of all the property passing under her exercise of said powers of appointment (R. 11).

The Commissioner's action was predicated upon the following provisions of the Revenue Act of 1926, as amended by Sec. 803(b) of the Revenue Act of 1932, 26 U. S. C. A. Sec. 41.

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> • • •

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *"

A Stipulation of Facts (R. 75-78) was filed in the case. The principal question in dispute before the Board of Tax Appeals and the Circuit Court of Appeals was whether the powers of appointment under the deed of trust and the will of Isaac Stephenson are general powers of appointment, and the value thereof properly included under the provisions of Section 302(f) of the Revenue Act in the gross estate of Elizabeth S. Morgan. If those powers of appointment are general, the value of the property passing by the exercise of such powers must be included in the value of her gross estate for taxation. If the powers are not general powers of appointment, the value of such property so passing cannot be so included.

The decision of the Board of Tax Appeals was rendered September 30, 1937 (R. 91; 36 B. T. A. 588). In its opinion the Board said, in stating the rule of law applicable to the case (R. 94):

"It has been held that in determining the nature and effect of powers, we look to the law of the state having jurisdiction. *Leser* v. *Burnet*, 46 F. (2d) 756; *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040, 1044."

That portion of the syllabus in *J. Earl Morgan, Executor*, v. *Commissioner*, 36 B. T. A. 588, immediately following the statement of facts, reads: "Held, under the *applicable law of the State of Wisconsin, etc.*" (Italics ours.)

The Board of Tax Appeals held that the case of *Cawker* v. *Dreutzer*, 197 Wis. 98, cited to the Board by petitioner as declaring the law of Wisconsin, was dictum. The Su-

preme Court of the State of Wisconsin in that case construed words of appointment used in the testamentary trust of one Cawker. Those words were almost identical with the words used in the Stephenson will and deed of trust, viz: "To such person or persons as she may appoint."

The Wisconsin court held that Cawker did not create thereby a general power of appointment but that it was a special power. The Board held, however, that the question of the character of the power of appointment was not before that Court, and its decision was not authority (R. 95, 96)—adopting the contention of the Commissioner.

The Board further held, in effect, that even if the decision in Cawker v. Dreutzer had been a holding, the Board would not have followed it, because the decision was "out of harmony with the decisions of the New York courts construing their similar statute." (R. 96.)

Thus, the Board of Tax Appeals followed the decisions of the courts of New York construing the statute of that state instead of the decision of the Supreme Court of Wisconsin construing the statute of Wisconsin.

The petitioner filed his petition for review in the United States Circuit Court of Appeals for the Seventh Circuit, and with it he filed various assignments of error (R. 103, 104). The petitioner made the same contentions before the Circuit Court of Appeals that he had made before the Board. The respondent, however, presented an argument exactly contrary to his argument before the Board. He told the Circuit Court of Appeals that the federal law controlled and not the law of the state, which he had contended before the Board, and as the Board had held was the applicable law.

The Circuit Court of Appeals entered judgment affirming the decision of the Board of Tax Appeals, but upon an entirely different principle of law than the Board had announced. It held that the federal law controlled and under the federal law the powers of appointment in the will and deed of trust were general powers.

The Court cited as its authority the case of *Johnstone* v. *Commissioner*, 76 F. (2d) 55, which follows other decisions of the Circuit Court of Appeals, declaring the general usage or the common law. We will show later in this petition that those decisions have no binding authority.

The Circuit Court of Appeals improperly held that even though under the Wisconsin law the powers in the will and deed of trust were special and not general powers, yet that fact is immaterial, because such a power as in the Stephenson instruments *"satisfies the definition of a general power as that term is used in Section* 302 *(f), even though it is characterized as a special power under statutory provisions in Wisconsin."* (R. 116.)

The Circuit Court of Appeals improperly rejected the contention of the petitioner that the Wisconsin law was controlling. Petitioner argued that a recent decision of the Circuit Court of Appeals for the Ninth Circuit, in *Bank of America* v. *Commissioner*, 90 F. (2d) 981, to the effect that the state law is immaterial, (p. 983) had been disapproved by this court in *Lang* v. *Comm'r.*, 304 U. S. 264, 267 (1938). He also showed that the Circuit Court of Appeals for the Ninth Circuit had relied as authority for its decision on *Burnet* v. *Harmel*, 287 U. S. 103, which this court, as we shall show later, held did not warrant the construction placed upon it by the Circuit Court of Appeals.

The Circuit Court of Appeals in the instant case improperly overruled petitioner's contention that the state law was

settled by the Statutes of Wisconsin, and the decision of the Supreme Court of that State in *Cawker* v. *Dreutzer, supra.*

The Circuit Court of Appeals should have followed the case of *Leser* v. *Burnet,* 46 Fed. (2d) 756.

The Circuit Court of Appeals should not have held that petitioner's cause was not within the reasoning and decision of *Leser* v. *Burnet.*

The Circuit Court of Appeals should not have based its decision that the federal law controls upon the authority (R. 116) of *Burnet* v. *Harmel, supra,* for the reason that that decision is not the applicable law to this case.

The Circuit Court of Appeals should not have based its opinion on the authority of *Lyeth* v. *Hoey,* 305 U. S. 188, construing the provision of the taxing law pertaining to an exemption in the federal statutes from certain taxation, which decision we will show later is not applicable here.

Petitioner contended before the Circuit Court of Appeals that the intent of Isaac Stephenson must be ascertained and such intention be effectuated by the court by holding that he did not intend to create general powers of appointment in his daughters, which would grant to them absolute power of disposition over the property.

The Circuit Court of Appeals should have held that, notwithstanding the use in these instruments of technical words the legal significance of which might create general powers of appointment, yet if the intent of Isaac Stephenson is apparent not to employ such words in the technical sense the Court should not give them their technical meaning, and should construe such words to effectuate his intention not to grant a general power of appointment.

Reasons Relied Upon for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Leser* v. *Burnet*, 46 F. (2d) 756, and also the decision of the Circuit Court of Appeals for the Third Circuit in *Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164.

The Circuit Court of Appeals in the *Leser* case held in a case involving estate tax liability almost identical in its facts with the case at bar, that the law of Maryland, in which State the property was situated, controlled.

Likewise, the Circuit Court of Appeals in *Whitlock-Rose* v. *McCaughn* held under similar facts that the law of the State of New Jersey, where the property was situated, controlled.

2. The decision of the Circuit Court of Appeals is also in conflict with the decisions of the Board of Tax Appeals in federal cases holding that whether a power of appointment is a general power is determined by the law of the state in which the property passing under the exercise of such power is situated. Those cases are: *Waldemar R. Helmholz, Executor*, v. *Commissioner of Internal Revenue*, 28 B. T. A. 165 (Wis.) (1933). In that case, the Board of Tax Appeals cited *Cawker* v. *Dreutzer*, 197 Wis. 98, as an authority for its decision.

Kendrick, et al., Executrices, v. *Commissioner*, 34 B. T. A. 1040 (Penn.) (1936).

Morgan v. *Commissioner*, 36 B. T. A. 588 (1937). This is the case at bar, in which the Board held that the law of Wisconsin is applicable.

Estate of Shepherd v. *Commissioner*, C. C. H. (1938), Board of Tax Appeals Service, p. 27950; 39 B. T. A. (5) (Decided Jan. 4, 1939).

3. The decision of the Circuit Court of Appeals in the instant case is in conflict with the applicable decisions of this Court, viz:

Lang v. *Commissioner*, 304 U. S. 264 (1938).
Sharp, et al. v. *Commissioner*, 303 U. S. 624 (1938).
Blair v. *Commissioner*, 300 U. S. 5 (1937).
Freuler v. *Helvering*, 291 U. S. 35 (1934).

In all the above cases this Court held that the law of the state and not the federal law controlled as to what property might be included in the gross estate of a decedent for purposes of estate tax assessment.

4. The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Supreme Court of Wisconsin in *Cawker* v. *Dreutzer*, 197 Wis. 98.

5. The question involved in this case has never been decided by this Court.

As appears from the above conflict of cases, there exists great uncertainty in the minds of the Government's taxing officers, the Board of Tax Appeals, and the Federal Courts, in dealing with this subject. A notable example is *Burnet* v. *Harmel*, 287 U. S. 103, the meaning of which was misinterpreted by the Circuit Court of Appeals for the Ninth Circuit in *Bank of America* v. *Commissioner*, 90 Fed. (2) 981.

6. It is important that this question be finally settled by the decision of this Court.

The subject is one in which every citizen of this country owning and devising property is interested; and in which

every member of the bar is concerned, so that he may properly advise his clients.

We think we might say, without presumption, that the officers of the Government must also be desirous of having such a perplexing situation finally settled by the judgment of this Court.

Wherefore, your petitioner, J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and transmit to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all of the proceedings in the case numbered and entitled on its docket, "Number 6611, *J. Earl Morgan, Executor of the Estate of Elizabeth S. Morgan, Deceased, Petitioner*, v. *Commissioner of Internal Revenue, Respondent;*" and that the judgment of said Court, affirming the decision of the United States Board of Tax Appeals, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BRODE B. DAVIS,
ARTHUR M. KRACKE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

We have analyzed the opinion of the Circuit Court of Appeals and the Board of Tax Appeals in our petition, and will not discuss it further at this place. The opinion appears at Page 112 of the Record and is reported in *Morgan* v. *Commissioner*, 103 Fed. (2d) 636.

Statement as to Jurisdiction.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals on writ of certiorari is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, paragraph 1, 43 Stat. 938 (Title 28, U. S. C. A., Sec. 347).

Statement of the Case.

The facts are sufficiently stated in the petition to which reference is made.

Specification of Errors.

The petitioner assigns as error the following acts and omissions of said United States Circuit Court of Appeals:

1. The Circuit Court of Appeals erred in affirming the decision of the United States Board of Tax Appeals which affirmed the determination by the Commissioner of Internal Revenue of the alleged deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan.

2. The Circuit Court of Appeals erred in sustaining the action of the Commissioner of Internal Revenue in including, in the value of the gross estate of Elizabeth S. Morgan, for federal tax purposes, the value of property

passing under decedent's exercise of the powers of appointment.

3. The Circuit Court of Appeals erred in holding that the powers of appointment granted to Elizabeth S. Morgan were, under the federal law, general powers and not special powers; and that the statutes of the State of Wisconsin and the decision of the Supreme Court of that State to the contrary, are immaterial.

4. The Circuit Court of Appeals erred in failing to ascertain from said will and deed of trust the intention of Isaac Stephenson not to create general powers of appointment.

5. The Circuit Court of Appeals erred in not holding that the intention of Isaac Stephenson not to create general powers of appointment in said will and in said deed of trust was controlling over any language used by him in said instruments pertaining to powers of appointment.

6. The Circuit Court of Appeals erred in failing to hold that the language in the deed of trust and in the will should be liberally construed by the Court in order to effectuate the actual intention of Isaac Stephenson.

7. The Circuit Court of Appeals erred in failing to hold that the powers of appointment in the will and deed of trust were limited by the authority given to the Trustees to withhold property from unworthy beneficiaries thereby annulling any appointment made by the donee, and therefore the donee did not have an unfettered, general power of appointment.

8. The Circuit Court of Appeals erred in holding that the appointees under the exercise of the powers of appointment by Elizabeth S. Morgan were not included within the term "beneficiaries" in the will and deed of trust, and that, therefore, her power to appoint even unworthy appointees was not restricted.

9. The Circuit Court of Appeals erred in holding that the case of *Lyeth* v. *Hoey*, 305 U. S. 188, was applicable to this case.

10. The Circuit Court of Appeals erred in holding the case of *Cawker* v. *Dreutzer*, 197 Wis. 98, to be dictum.

11. The opinion of the Circuit Court of Appeals and its decision entered pursuant thereto are not supported by the facts in this case or the law applicable thereto.

12. The Circuit Court of Appeals erred in entering judgment affirming the decision of the United States Board of Tax Appeals, which affirmed the determination by the Commissioner of Internal Revenue of a deficiency in the estate tax liability of the Estate of Elizabeth S. Morgan, deceased.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals held that the federal law controls and not the law of the State and that under federal law the powers of appointment in question are general powers. Such a holding is in conflict with:

A.

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit, in Leser v. Burnet, 46 Fed. (2d), 756, and the decision of the Circuit Court of Appeals for the Third Circuit, in Whitlock-Rose v. McCaughn, 21 Fed. (2d), 164;

(2) The decisions of this Court holding that the State law controls;

(3) The decisions of the United States Board of Tax Appeals, holding that the State law controls.

B.

(1) The decision of the Circuit Court of Appeals is in conflict with the statute of the State of Wisconsin pertaining to powers of appointment, and the decision of the Supreme Court of Wisconsin, in Cawker v. Dreutzer, 197 Wis. 98;

(2) The argument that Cawker v. Dreutzer, 197 Wis. 98, is dictum is unfounded;

(3) The statute of Wisconsin provides that a power of appointment is general only when it authorizes an alienation in fee to any alienee; and, impliedly, an absolute power of disposition, such as a general power of appointment, accompanied by a trust, if given to the owner of an estate for life, shall not be changed into a fee.

II.

The powers in the will and deed of trust are limited by the grant of absolute power to the trustees to annul through withholding property any appointment made by the donee.

A.

(1) The Circuit Court of Appeals should not have held that the restriction in the will and deed of trust (against unworthy persons receiving any property) applied only to unworthy beneficiaries, and that such restriction did not apply to unworthy appointees. Therefore, it did not limit the donee's power to appoint to any persons whomsoever, worthy or unworthy.

III.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from the instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the intent of the testator not to grant a general power of appointment.

(4) The Circuit Court of Appeals should not have limited its examination into the intent of the testator purporting to support its finding that the powers were general, and should have ascertained his intent not to grant a general power.

IV.

The reservation by Isaac Stephenson to himself in his will and deed of trust of the right to name the line of descent if donee should fail to exercise the power, stamped such power as a special power because it embraced an interest less than a fee.

V.

There is no valid federal definition nor standard of general powers of appointment.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulation 80, is inoperative.

(2) The decisions of various courts of appeals of the United States purporting to declare a general usage or common law definition of general powers of appointment are not authority in this case, as there is no common law of the United States.

VI.

The Circuit Court of Appeals erred in not holding as retroactive and void the Revenue Act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment by the decedent as donee.

ARGUMENT.

I.

The Circuit Court of Appeals held that the federal law controls and not the law of the State; that therefore the powers of appointment in question are general powers. Such a holding is in conflict with:

A.

(1) The decision of the Circuit Court of Appeals for the Fourth Circuit, in Leser v. Burnet, 46 Fed. (2d), 756, and the decision of the Circuit Court of Appeals for the Third Circuit, in Whitlock-Rose v. McCaughn, 21 Fed. (2d), 164;

In the *Leser* case, the power of appointment was created in an instrument of trust which provided that, upon the decease of the donee, the Trustee was to hold the property in trust for the use of "such person or persons as she by her last will and testament * * * shall have appointed to take the same." The donee duly exercised the power by her will. The Board of Tax Appeals affirmed the determination of the Commissioner of Internal Revenue including, for the purpose of taxation of the estate of the decedent donee, the value of the property passing under the exercise of her power of appointment. The question before the Circuit Court of Appeals for the Fourth Circuit was precisely the same which is presented here, viz: Can the Commissioner lawfully include the value of such property in decedent's estate for purposes of estate taxation?

The Court held that the question whether the power of appointment was a general power was to be determined by the law of Maryland, stating that (p. 760) "we look to the law of Maryland as laid down by its courts to determine the effect of conveyances executed within that State and relating to property there situate." The Court found that it was the settled law of the State that the power in question was not a general power; that under the law of Maryland the donee had no right under the power to exercise it in favor of her creditors; and that such right is a fundamental characteristic of a general power of appointment. Lacking that right in Maryland, the power of appointment was not general.

The Court therefore held that the Commissioner should not have included in the gross estate of the donee, for taxation, the property passing under the power of appointment.

As to the objection urged by the Commissioner, to the Court's holding (p. 761) that its effect "is to destroy the uniformity of operation of the statute, as the language used would unquestionably create a general power in most other States. We do not think so. The Revenue Act provides for the inclusion only of property passing under general powers; and if a will or deed, as properly interpreted under the applicable law, creates a power which is not general but special or limited, it does not fall within the meaning of the Act."

The Circuit Court of Appeals in *Whitlock-Rose* v. *McCaughn*, 21 F. (2d), 164, held that where the property passing under the power was situated in New Jersey, the law of New Jersey controlled on the question as to whether the power was a general power of appointment.

No application was ever made for a writ of certiorari from this Court to review the decisions of the Circuit Courts of Appeal in *Leser* v. *Burnet,* and *Whitlock-Rose* v. *McCaughn.* The decisions stand and have stood ever since their rendition, unquestioned by any decision of this Court.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court holding that the State law controls.

The Circuit Court of Appeals of the Seventh Circuit, in the instant case much in the same manner as did the Circuit Court of Appeals for the Ninth Circuit in the case of *Bank of America* v. *Commissioner,* 90 F. (2d) 981 (1937), has extended the holding of this court in *Burnet* v. *Harmel,* 287 U. S. 103, 110, far beyond the meaning of that decision. In the *Bank of America* case three Judges sat, out of seven Judges constituting the Court of Appeals for that Circuit. The Court had before it the question as to whether the federal taxing power was bound by the California community property law in determining the nature and ownership of the property, the value of which was sought to be included in the gross estate of the decedent for purposes of estate tax assessment.

In that case, the decedent and his wife were residents of California. Decedent took out certain policies of life insurance on which the premiums were paid out of community property. California Civil Code, Sec. 161a provides that the respective interests of the husband and wife in community property are present, existing and equal interests. On decedent's death his Executor included in the estate tax return only one-half of the amount of these policies in the gross estate. The Commissioner included the full amount of the policies as being owned

by the decedent. Decedent's executor contended that under the California community property law, the wife was the owner of one-half of the proceeds of the insurance policies, and therefore the decedent had no power of disposition or control at his death over the wife's half of such proceeds, and the estate could not be taxed for such half. The majority of the Judges sitting held, under a misapprehension of the meaning of *Burnet* v. *Harmel, supra,* (1) that the state law could control only when the taxing statute made its operation dependent on state law; (2) that there was nothing to indicate that the taxing statute (Sec. 302 (g)) made its operation dependent on California law; and (3) therefore the federal law controlled as to the question whether the decedent was the owner of the proceeds of all the life insurance policies. They therefore held that "the local law is immaterial." (*Bank of America* v. *Comm'r.*, 90 Fed. 2d, 983.)

Less than a year subsequent to the above decision, the case of *Lang* v. *Commissioner,* 304 U. S. 264 (1938) came before the Circuit Court of Appeals for the Ninth Circuit. While that case was pending, three of the seven judges of the court certified propositions of law to this Court (C. C. H., Federal Tax Service (1938) Vol. 4, p. 9819), setting forth that the decision rendered by two of the judges out of three who sat in the case of *Bank of America* v. *Comm'r., supra,* did not represent the view of the remaining five Judges of the Court. They requested this Court to give instructions to the Circuit Court of Appeals for the proper decision of the case then before it—the *Lang* case. The certificate recited that these two judges had held that the statutes of California relating to community property could not affect the interpretation of the Revenue Act.

The facts in the *Lang* case, in which the judges of the Circuit Court of Appeals certified the propositions, were

that Lang and his wife lived in the State of Washington (where community law obtains), until his death, at which time certain policies of insurance upon his life were in force. All the premiums upon the policies were paid for from community funds. The Commissioner of Internal Revenue determined that the proceeds from all such policies were part of the insured's gross estate and assessed accordingly. The assessment was upheld by the Board of Tax Appeals.

Pursuant to the certificate of the Circuit Court of Appeals, requesting instructions, this Court in *Lang* v. *Commissioner*, 304 U. S. 264, instructed the Circuit Court of Appeals that only one-half of the proceeds from the insurance policies became a part of the decedent's gross estate; that the estate could not be taxed for the other half of the proceeds of the policies which was owned by his wife under the provisions of the Community Property Law of the State of Washington. This Court ruled that the state law controlled.

The Circuit Court of Appeals in *Bank of America* v. *Commissioner*, *supra*, based its ruling that the local law was immaterial on the supposed authority of *Burnet* v. *Harmel*, 287 U. S. 103, which had held that the State law controlled only when the taxing statute makes its operation dependent on State law.

This Court, in *Lang* v. *Commissioner*, 304 U. S. 264, answered the request by the Judges of the Circuit Court of Appeals for instructions, and said that the holding in the *Bank of America* case, that local law was immaterial, is "not accurate and conflicts with what we have said." (p. 267.)

In *Poe* v. *Seaborn*, 282 U. S. 101, the question before this Court was as to whether the Commissioner could tax against the husband the entire income received from community property owned by him and his wife in the State of Washington, or whether each should be taxed for one-half of the income on such property. This Court held that whether the interest of the wife in community income is taxable apart from the interest of the husband, was to be determined by the state law of Washington (p. 110), and that under that law the income of only one-half of the property could be taxed to the husband.

Another case in which the Court applied the rule that local law controls is *Blair* v. *Commissioner*, 300 U. S. 5. In that case a beneficiary under a trust assigned to third persons part of his income from the trust. In a case in a state court construing the will under which the trust was created, the Appellate Court of Illinois held that the trust was not a spendthrift trust and that the beneficiary's assignment was valid. The Commissioner of Internal Revenue contended that, notwithstanding the Court's decision the trust was a spendthrift trust, the assignment was invalid, that it must be ignored, and that the beneficiary was liable for a tax upon the entire income, regardless of the assignment, because he was still the owner of the income, as he had never legally assigned it. This Court held that the decision of the Appellate Court of Illinois was binding upon the Federal taxing power, and that the beneficiary could not be taxed upon the income which he had assigned. The Court said that the question of the validity of the assignment is a question of local law. The donor was a resident of Illinois and his disposition of the property in that state was subject to its law. "By that law, *the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign*

that interest, in whole or in part, are to be determined. The decision of the State Court upon these questions is final." (p. 9) (Emphasis ours.)

In *Sharp* v. *Commissioner*, 91 F. (2d) 802, the Circuit Court of Appeals for the Third Circuit sustained an assessment by the Commissioner of Internal Revenue against decedent's estate on property which the Commissioner determined was owned by the decedent at the time of his death. Decedent's executors contested the assessment and claimed that the property was owned by a trust estate created by the decedent. The ownership had been decided by the decree of a State Court of competent jurisdiction which had held that the decedent did not own the property but that it was owned by the trust estate. The reason given by the Circuit Court of Appeals for sustaining the assessment and disregarding the decision of the State Court, was that the decision was binding only upon distributees of the estate, *but it could not bind the taxing power of the Government.*

On certiorari granted, this Court, in *Sharp* v. *Commissioner*, 303 U. S. 624 (1938), reversed the decision of the Circuit Court of Appeals, citing *Freuler* v. *Helvering*, 291 U. S. 35, 43, 45; *Blair* v. *Commissioner*, 300 U. S. 5, 9, 10.

In *Freuler* v. *Helvering, supra*, this Court held that the decree of a state court holding that annual deductions for depreciation of trust property should have been taken from gross income before making distributions to beneficiaries, establishes the rights of the parties, and permits deductions from distributable income on account of depreciation. Further, that this order of the state court governed the distribution and was effective to fix the amount of the taxable income of the beneficiaries. The Circuit Court of Appeals held that the decision of the State Court was not conclusive in the administration of

the Federal Revenue Act. This Court overruled the Circuit Court of Appeals, and held that the decision of the State Court established the law of California on the property rights of the beneficiaries; and that it must control in applying an income taxing act (p. 45).

The decisions of this Court in *Lang* v. *Commissioner*, *Poe* v. *Seaborn*, *Blair* v. *Commissioner*, and *Freuler* v. *Helvering*, show the intention of this Court not to have the meaning of its language in *Burnet* v. *Harmel*, 287 U. S. 103, enlarged beyond the scope intended by the Court in deciding the case on the facts before it.

We contend that the rule announced in the above cases, that the State law controls, is strictly applicable to the instant case, and that the Circuit Court of Appeals erred in not holding to that effect.

It may be replied that this Court in the case of *Lyeth* v. *Hoey*, 305 U. S. 188, did not follow the rule laid down in the *Lang*, *Poe*, *Blair*, *Sharp* and *Freuler* cases. The complete answer to such an argument is that, in the *Lyeth* case the Court was concerned only with Section 22 (B) (3) of the Revenue Act, which *exempted* from income "the value of property acquired by gift, bequest, devise or inheritance." The Commissioner in that case attempted to assess an income tax on property which the taxpayer contended he had acquired by inheritance, and that it was therefore, under the statute, exempt from income tax. The Commissioner insisted that under the law of Massachusetts, which controlled, the property had not been acquired by inheritance, and therefore was not exempt.

The Court held that the question as to the construction of an exemption of the federal statute, is not determined by local law. The feature that distinguishes the *Lyeth* case from the case at bar is that the *Lyeth* case involved an exemption provision of the revenue law, whereas the

other decisions of this court cited above involved a *taxing* provision of that law. Clearly, Congress does not have to consult State law in determining what property will be omitted from taxation. It is when Congress seeks to impose the burden of a tax upon property of the taxpayer, and the law of the State in which the property is situated has determined the nature of that property, that the state law must control, and its decision is binding on the taxing power of the Government. The rules for construction as between an exemption provision and a taxing provision are quite different. In interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their operations so as to embrace matters not specifically pointed out, and in case of doubt they are construed most strictly against the Government and in favor of the citizen. *Gould* v. *Gould*, 245 U. S. 151.

In Paul on "Selected Studies in Federal Taxation," Second series (p. 12), the author states:

> "The Federal estate tax consciously incorporates state law by its reference to 'a general power of appointment' in Sec. 302(f) * * *"

(3) The decision of the Circuit Court of Appeals is contrary to the decisions of the United States Board of Tax Appeals holding that the State law controls.

These decisions are:

(a) *Waldemar R. Helmholz* v. *Commissioner*, 28 B. T. A., 165. This case followed the rule that the law of the state controls, citing with approval *Leser* v. *Burnet*, 46 F. (2d) 756 (p. 173), and *Cawker* v. *Dreutzer*, 197 Wis. 98 (p. 175).

(b) *Christine Smith Kendrick, et al., Executrices, etc.*, v. *Commissioner*, 34 B. T. A. 1040, in which the Board held that the federal taxing power was bound by the law of Pennsylvania in determining the effect of powers of appointment (p. 1044).

(c) *J. Earl Morgan, Executor*, v. *Commissioner*, 36 B. T. A. 588, the instant case, in which the Board held (p. 591) that "in determining the nature and effect of powers we look to the law of the State having jurisdiction." It is apparent from the decision of the Board that the only reason it did not hold the power in the *Morgan* case to be a special power of appointment on the authority of *Cawker* v. *Dreutzer*, 197 Wis. 98, is that it believed the decision in that case to be *dictum*, as contended by the respondent.

(d) *Estate of Frederick Shepherd* v. *Commissioner*, 39 B. T. A. ....., No. 5 (January, 1939); C. C. H. Board of Tax Appeals Service (1938) (p. 27,950), in which the Board held that a decision of a *nisi prius* court in Illinois, holding a power of appointment not to be a general power, is binding on the taxing power of the government. In that case the Board said (p. 27,952) that "the Board, like the Federal courts, is bound by decisions of the state courts, in regard to property rights, and the effect of conveyances executed within the State relating to property situated therein." Citing *Warburton* v. *White*, 176 U. S. 484; *Tyler* v. *United States*, 281 U. S. 497; *Leser* v. *Burnet*, 46 F. (2d) 756; *Freuler* v. *Helvering*, 291 U. S. 35; *Blair* v. *Commissioner*, 300 U. S. 5; *Sharp* v. *Commissioner*, 303 U. S. 624; *Union & Peoples National Bank of Jackson, et al., Administrators*, 30 B. T. A. 1277 (Dec. 8649); *Christine Smith Kendrick, et al., Executrices*, 34 B. T. A. 1040 (Dec. 9480). It will be noted that the Board

of Tax Appeals, in *Estate of Frederick Shepherd* v. *Commissioner, supra,* cited the Sharp, Freuler, and Blair decisions of this court, as authority for its holding that the state law controls as to whether the federal government can tax a power of appointment as a general power.

It thus appears that the Board of Tax Appeals, as late as January, 1939, is still applying the rule that the State law controls in these general powers of appointment taxing cases, while the Circuit Courts of Appeals are still deciding, as in the instant case, that the federal law controls, following the disapproved decision in *Bank of America* v. *Commissioner,* 90 F. (2d) 981.

B.

(1) The decision of the Circuit Court of Appeals is contrary to the law of the State of Wisconsin pertaining to powers of appointment.

The Supreme Court of the State of Wisconsin, in *Cawker* v. *Dreutzer,* 197 Wis. 98, as we have said, construed the power of appointment in a will and testamentary trust not to be general powers of appointment but special powers.

The applicable statute of Wisconsin is as follows:

> "Sec. 232.05. *General Power.* A power is general when it authorizes the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power to any alienee whatever."
>
> "Sec. 232.06. *Special Power.* A power is special: (1) When the person or classes of persons to whom the disposition of the lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will or charge of a particular estate or interest less than a fee."

"Sec. 232.08. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or for years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the lands should not be sold for the satisfaction of the debts."

In the *Cawker* case, one of the donees of powers of appointment filed a suit setting forth that she and her sister had been given, under the will and trust, a life income in the property, that they were also donees under the general powers of appointment, and by virtue of such powers they had complete and absolute title to the property. They also alleged that they had an absolute power of disposition under said powers of appointment, and as donees thereunder they should be adjudged by the Court to hold the fee. The Court held that the powers of appointment did not give them absolute power of disposition of the property, nor the complete and absolute title thereto, nor the fee to the property, and that the powers of appointment were not general powers.

(2) The argument that Cawker v. Dreutzer, 197 Wis. 98, is dictum is unfounded.

The contention that the decision in *Cawker* v. *Dreutzer*, 197 Wis. 98, is *dictum* is without foundation. The contention was first presented by the respondent before the Board of Tax Appeals, which adopted it in its decision. It was stated as a finding by Judge Lindley of the Court of Appeals, who concurred in the majority opinion. The argument that the *Cawker* case is not a holding is based upon the unsupported assertion that the question as to whether the powers of appointment were general powers

was not before the court. The charge of *dictum* completely ignores the words of the Supreme Court of Wisconsin in its opinion. There it recited (p. 129) the questions before it for consideration and among others: "(3) Whether the powers of appointment in the will were valid, and, if so, their effect."

The charge of dictum also ignores the statement of the Court in its opinion as to the pleadings (p. 133) as follows:

> "It is claimed by the plaintiff respondent that having the power of appointment whereby they may dispose by will of the whole estate absolutely and having a life estate, the two estates merge, and the daughters had complete and absolute title in the property."

It is insisted in effect that the Supreme Court had no such pleading or claim of the plaintiffs before it at the time of the hearing or of the rendition of the judgment in the case. Also that the only attempt of either of the donees to present such a pleading or claim to the court was in a pleading known in Wisconsin practice as Application for Review of Judgment, filed after the case had been tried. The facts are that the request was made after the rendition of judgment, but it was only a *repetition* of the first complaint filed by the plaintiff in the suit.

An examination of the files in this case in the Supreme Court of Wisconsin shows this clearly. The transcript of the record filed in the Supreme Court at the August Term, 1928, contains the complaint of the plaintiff in which the following language appears (p. 5):

> "Therefore, this plaintiff demands the judgment of the Court in the premises of adjudging and declaring: (1) Whether the plaintiff shall not be deemed, by virtue of the power given to her by said will, to possess an absolute power of disposition of her half of the

residuary estate, within the meaning of the statutes of the State of Wisconsin; (2) whether, under the provisions of the State of Wisconsin, and by virtue of the absolute power of disposition given to her, *and as grantee of the power*, she is not entitled to an *absolute fee* in the one-half of the residuary estate of E. Harrison Cawker, Deceased." (Italics ours.)

In the same transcript (p. 24) appears the plaintiff's amended complaint, in which the above requests are made in the identical language.

The files in the Supreme Court also contain the brief of Leonore H. Cawker, the plaintiff in the case, in which appears (p. 15) the following, viz:

> "The respondent, Leonore H. Cawker, requested both in her complaint, and in the proposed findings, that the court adjudicate whether this plaintiff shall not be deemed *by virtue of the power* given to her by said will to possess an absolute power of disposition of her one-half of the residuary estate. • • •
>
> "This request is *repeated* in her application for a review, served and filed therein." (Italics ours.)

The "absolute power of disposition" prayed for in the complaint is a synonym for "general power of appointment." 21 R. C. L., Sec. 3, p. 774, citing *Thompson* v. *Garwood*, 3 Whart. (Pa.) 287.

It thus appears, as the Supreme Court stated specifically in its opinion, that the plaintiff in her complaint had asked for an adjudication of the exact question which the court determined by its decision.

The meaning of the words in respondent's brief above referred to "that this request is *repeated* in her applica-

tion for review" (in the Supreme Court) is that Leonore Cawker had not attempted to perfect an appeal from the decree of the Circuit Court *until subsequent to the appeal perfected by another defendant,* Hortense Cawker Merrill.

The Practice Act of the law of Wisconsin at that time provided that if one of several joint or several defendants attempts to appeal, after another defendant had appealed, the latter defendant so appealing must, *in a petition for review of the judgment, repeat the allegations of her petition,* in order to present her exceptions to the Supreme Court. It was this *second and repeated request,* made by Leonore Cawker after judgment, in her petition for review of judgment, which the court *refused to entertain.* Due consideration given to the words of the Court in *Cawker* v. *Dreutzer* would have shown how unfounded was the charge of dictum in this case. We have had to adopt an unusual procedure to present the facts in this case to this Court but felt it only fair to ourselves and to the Court that they should be presented.

(3) By the statute of Wisconsin, a power is general when it authorizes the alienation of a fee to any alienee; and impliedly an absolute power of disposition, such as a general power of appointment, accompanied by a trust, if given to the owner of an estate for life, shall not be changed into a fee.

Section 232.08, which appears at page 29 of the Argument, provides that when an absolute power of disposition *not accompanied by a trust* shall be given to the owner of an estate for life, such estate shall be changed into a fee. These are affirmative words which also convey a negative meaning. As said by this Court in *Marbury* v. *Madison,* 1 Cranch, 138, 174:

> "Affirmative words are often in their operation negative of other objects than those affirmed; and in this

case a negative or exclusive sense must be given to them or they have no operation at all."

In applying this principle to Section 232.08 of the statute in question it is plain that the effect of the statute is to declare that an absolute power of disposition, *accompanied* by a trust, shall *not* be changed into a fee when given to the owner of a life estate.

It would therefore appear that by the law of Wisconsin a power, *accompanied* by a trust, is not subject to the payment of the donee's debts, is not equivalent to absolute ownership so as to be taxable under Section 302(f) of the Revenue Act and is not a general power of appointment.

II.

The powers in the will and deed of trust are limited by the grant of absolute power to the trustees to annul through withholding property any appointment made by the donee.

A.

(1) The Circuit Court of Appeals should not have held that the restriction in the will and deed of trust against unworthy persons receiving any property applied only to unworthy beneficiaries, and that such restriction did not apply to unworthy appointees. Therefore, it did not limit the donee's power to appoint to any persons whomsoever, worthy or unworthy.

The petitioner has assigned as error the failure of the Court to hold that the power given to the trustees in Item 15 (R. 26) and in Item 26 (R. 61) was a positive restriction upon the powers of Elizabeth S. Morgan to appoint. The restriction is implicit in the very grant of the power to her.

Item 15 of the deed of trust (R. 26) and Item Twenty-Six of the will (R. 61) provide that whenever in the judgment of the Trustees, the trust property going to

any beneficiary, whether income or corpus, will be dissipated, or improvidently handled through intemperate or spendthrift habits, *lack of business capacity or for any other reason or reasons,* the trustees shall withhold, if they deem it best, from any such beneficiary, the whole or any part of said trust property, whether income or corpus (Emphasis ours). By reason of this right of the trustees to nullify the exercise by the donee of the powers of appointment they are unquestionably special powers and not general powers. *Hepburn* v. *Commissioner,* 37 B. T. A. 459. In that case the Board of Tax Appeals held that a power of appointment, the exercise of which at any time is in fact subject to the discretionary approval of individual trustees appointed by the donor of the power, is not a general power of appointment and property passing thereunder is not within the Revenue Act, Section 302 (f).

In the instant case, the right of the trustees to withhold property, *for any reason,* from an appointee is in effect the right to annul the power, and that right exists and will continue to exist for seven years. The trustees can at any time thus render any appointment ineffective and inoperative. The powers of appointment, therefore, are not "unfettered". (*Leser* v. *Burnet,* 46 Fed. (2d) 756.) *The property therefore has not "passed" and consequently there has been no "passing" of the property or its value to be taxed.*

The restriction upon the powers of appointment, through the right of the trustees to withhold property applies to the appointees in whose favor the power may be exercised by the donee, and the provision regarding the withholding of property embraces any appointee in whose hands the property, in the judgment of the trustees, might be dissipated or improvidently handled, through intemperate or spendthrift habits, lack of business capacity, or subjection to

the injurious influence of others affecting business capacity, *or for any other reason or reasons.* The judgment of the trustees is final and conclusive.

The restriction is an actual declaration by the donee's father to her, that the class described by him in the above words as being disqualified, must not be appointed by her in the exercise of her power of appointment.

The fact that the determination of the authority of the trustees to nullify the donee's exercise of the power, is confided to the judgment of the trustees, does not argue in any wise that there is no limitation of the power of appointment. The donee exercising the power is under the same restrictions in respect to that exercise as are the trustees in determining the propriety of the exercise. It is not a situation where the grant of power may be exercised by the donee regardless, with, for instance, a succession of appointees, each one after the other, who have been declared by the trustees to be of the forbidden type. The provision is a sensible one and binding upon Elizabeth S. Morgan *to the same extent as upon the trustees. The donor obviously in the limitation stated was speaking to Elizabeth S. Morgan in the same voice with which he was speaking to the trustees.* This is not the case of a grant of unlimited power of appointment to Elizabeth S. Morgan subject to defeasance at the will of the trustees, although even this would have given her something very short of absolute or fee simple title. It is a case in which she, in exercising her power as donee, may do so only for the benefit of the class of proper appointees so described by her father, with no thought that she would make an appointment or a series of appointments, each one in turn to be ruled out by the trustees until one appointee happened to avoid the limitations.

This provision of the trust deed requires the trustees to pay the income to such person or persons as are ap-

pointed to receive the income, and, at the termination of the trust, to transfer the property to such person or persons as are appointed to receive the principal. The Circuit Court of Appeals says the trust deed makes no provision controlling the appointee's interest in case he should die intestate. No more does the trust deed make provision controlling the disposition of the appointee's interest in case he should die testate. In fact, no provision is made as to what should happen in case the appointee should die before coming into the enjoyment of the appointed property. Does this failure to include such a provision make the appointee any less a "beneficiary" within the meaning of Item 15? (R. 26.)

If the appointee should die before coming into the enjoyment of the appointed property, regardless of whether it should be held that the appointed property should then be paid to his legatee if testate, or his issue or heirs if intestate, or be held to lapse and the property be required to be distributed among the remaining parts, the appointee would nevertheless be a beneficiary within the meaning of the law and the intent of the will and deed of trust. His legatees, heirs, issue or the beneficiaries of the remaining parts respectively, as the case might be, would take his place as beneficiaries under the trust deed within the meaning of Item 15. At the time of distribution, on the termination of the trust, a duty will devolve upon the trustees to determine in each case, in order to carry out the purpose of the trustor, as set forth in the preamble of the trust deed, and in Items 15 (R. 26) and 26 (R 61) thereof, whether the beneficiary, however designated, is worthy.

An examination of the trust deed reveals that Isaac Stephenson used the word "beneficiary" in only four items of his will, including Item 15. The other items are Items 12 (R. 26), 18 (R. 28) and 23 (R. 32). We find no express provision of the creator of the powers in any of these items, or anywhere in the deed, distinguishing between

beneficiaries named by him and appointees named by his donees. There are no reasons for believing that he intended to distinguish between the beneficiary named by him and the beneficiary (appointee) named by his donee, in addition to the fact that no such provision is made in the trust deed.

The trust was to continue for twenty-one years after the death of the grantor and his wife, and, as his children were all given powers of appointment, the grandchildren would not be protected in the manner contemplated by him unless the appointees were included in Item 15, since the children who were donees of the powers could appoint their own children, or as to those who had none, their brothers and sisters, or their nephews and nieces.

We discuss below the provisions of the deed of trust to which the Circuit Court of Appeals refers as indicating an intention to differentiate between beneficiaries and appointees precluding the inclusion of the latter among the former for purposes of Item 15.

We understand the theory of the Court on this point to be that if a donee who, of course, is a named beneficiary, one of trustor's children, should be found unworthy and die, exercising his power of appointment, the withheld property could not be paid to the appointee, as such, since by the deed such trust property must be paid to the donee's issue as such. Insofar as there is this limitation on the exercise of the power, supporting our contention that it is a special power, we should not object. We think this fault appears in the argument of the Court: it fails to distinguish between an effective and an ineffective appointment. Of course, the appointee under an ineffective appointment could never be a beneficiary under such appointment. Thus, a named beneficiary who dies before the trust terminates, could only have had income withheld. Such accumulated income is the withheld property which must be paid to his issue, or, if none, be distributed among

the other parts. The principal and subsequent income of his trust part was never property which the trustees could have paid to him and so could not be as to him "withheld property." Principal could not be withheld until the time for distribution arrives and the distributee is known. Until the distributee is known, the trustees could not determine whether he is worthy or unworthy. Therefore, the appointee of such donee will take the property included in the trust part appointed, being income after the appointment and principal, but withheld property, being income before the appointment, will go to the issue of the donee, and, in default of issue, to the other parts. To say that an appointee cannot be a "beneficiary" as to property withheld from him, is not to say that he cannot be a beneficiary with respect to property as to which the appointment takes effect. As will be noted, even as to withheld property, if the unworthy beneficiary leaves no issue, such withheld property goes to the other remaining parts, the beneficiaries of which may be the appointees of worthy beneficiaries. So, whether or not the trustor eliminated the appointees to withheld property yet he did not exclude them as to property with respect to which the appointment takes effect.

The Circuit Court of Appeals says that when a named beneficiary dies intestate, the trust deed provides that income shall be paid to issue then surviving, and, at the termination of the trust, the trustees shall transfer all property then in their possession to then surviving issue. The Court evidently refers to the provisions of the deed corresponding to the fourth paragraph of Item 10 of the Trust Deed (R. 23, 24) providing for the contingency of death. It will be noted that by the proviso contained in this paragraph, if there should be no issue the income and property is to be distributed equally among all the other then existing remaining parts.

III.

Whether the powers of appointment here are general or special depends solely upon the intent of Isaac Stephenson.

A.

(1) The intention of a testator or trustor controls over any words, however technical and however inconsistent their technical meaning is with his intention.

(2) It is immaterial that Isaac Stephenson used technical words usually held to be a definition of a general power, if it appears from these instruments that his intention was not to grant a general power, or an absolute power of disposition.

(3) The Circuit Court of Appeals should have held that the language of the instruments showed the clear intent of the testator not to grant a general power of appointment.

The intention of Isaac Stephenson controls over any definition or technical words in the instruments before the Court.

The value of the property passing under the powers of appointment exercised by Mrs. Morgan cannot be included in her estate for taxation (Sec. 302(f) Revenue Act) unless the power is a general power of appointment.

The powers are not general powers of appointment unless Isaac Stephenson *intended* to grant to his daughter as donee a general power of appointment.

The intention of the testator or trustor must be ascertained from the language of the instruments.

> "Powers are to be construed in accordance with the intention of the donor or grantor, as determined

under the rule relating to the construction of instruments generally." 49 C. J. p. 1260.

"A power cannot be extended beyond its express terms, *and the clear intention of the donor.*" Ibid. (Italics ours.)

The Circuit Court of Appeals recognized this rule of law, but contented itself with simply examining the alleged intention of the testator not to limit the general power of appointment, which the Court concluded he had created. (R. 118, 119, 120, 121.)

Petitioner urged before the Circuit Court of Appeals that the Court should examine the intention of the testator to ascertain whether he intended to give his daughters, donees under the powers, absolute power of disposition over the property.

In *Smith* v. *Bell*, 6 Pet. 68, 75, Chief Justice Marshal said:

"The first and great rule in the exposition of wills to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

This Court has also held that the same rule applies to the construction of trusts. *Green* v. *Green*, 90. U. S. 486.

The petitioner has assigned for error in this record that the Circuit Court of Appeals did not, as was held necessary in *Hepburn* v. *Commissioner*, 37 B. T. A. 465, ascertain the intention of the testator, "which is controlling" to create a general or a limited power of appointment.

Petitioner requested the Circuit Court of Appeals to hold that the first paragraph in the deed of trust (R. 13) and in the will (R. 38), together with other provisions

relating to the powers of the trustees and their control over the property showed his desire (*Hepburn* v. *Commissioner*, 37 B. T. A. 466) that his children should not have any ownership of or control over his property. He clearly indicated thereby his intention that they should not be given absolute powers of disposition such as they would legally have under general powers of appointment. The Circuit Court of Appeals, however, did not in its opinion even refer to this argument.

The fact that Isaac Stephenson in his will and deed of trust used the technical words "to such person or persons as she may appoint" (R. 19) which may have a definite legal signification, does not bar the petitioner here from the right to have the due consideration of the Court to the evidence of the testator's (trustor's) intention not to employ the words or terms in their technical sense. If that intent does appear from the instruments, it is the duty of the Court to construe the words not in their technical sense but so as to effectuate his intention. 69 C. J. 76; *Lyons* v. *Lyons*, 233 F. 744, 746.

If it should be held that petitioner is foreclosed from showing the intent of the testator (trustor), on the ground that his intent is immaterial, inasmuch as the words used by him have a definite legal meaning which cannot be changed by his intent, then such a holding would be in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Circuit Court of Appeals for the Seventh Circuit held that if a regulation promulgated by the Commissioner of Internal Revenue should be construed by a Court to make an irrebuttable presumption by means of an absolute prohibition of testimony relevant and pertinent to the factual issue, such a construction would

violate the due process clause of the Fourteenth Amendment. (*Commissioner* v. *Shattuck*, 97 Fed. (2d) 790. Citing *Heiner* v. *Donnan*, 285 U. S. 312.

(4) The Circuit Court of Appeals should not have limited its examination into the intent of the testator purporting to support its finding that the powers were general, and should have ascertained his intent not to grant a general power.

The result of the Court's examination is shown in its opinion (R. 118, 119, 120, 121). The Court finds that "the decedent's father intended to differentiate between beneficiaries under his will and deed and appointees under the wills of his children, to whom he granted powers of appointment." (R. 119.) The Court also finds (R. 121) that "the testator evidenced no intention of controlling whatever property passed to any appointees."

The Court reaches the astonishing conclusion that Isaac Stephenson, while using every means within his power to prevent his estate from being dissipated by his children, grand-children, and other relatives, was perfectly willing to have his estate dissipated by unworthy or spendthrift appointees! The very statement of the proposition is its own refutation.

A painstaking effort was made by the respondent to differentiate between "beneficiaries" and "appointees," as a basis of his argument that the donee held general powers of appointment. It is well settled in law that an "appointee" under a power of appointment and will is also a "beneficiary" under the will of the donor. (69 C. J. 851 (Sec. 1961)). *Lederer* v. *Pearce*, 262 Fed. 993, 997; affirmed 266 Fed. 497.

IV.

The reservation by Isaac Stephenson to himself in his will and deed of trust of the right to name the line of descent if donee should fail to exercise the power, stamped such power as a special power because it embraced an interest less than a fee.

In the deed of trust of Isaac Stephenson (R. 19), he provided that in the event Elizabeth S. Morgan should fail to appoint, or in making the appointment, should fail to dispose of the entire income and principal of her share of the trust estate, then the trustee should pay such annual income and principal to the issue of his said daughter. A like provision is made in Item 15 of the will of Isaac Stephenson (R. 49).

In *Cawker* v. *Dreutzer,* 197 Wis. 98, the provision was practically the same. The Court said in its opinion (p. 133), in speaking of the testator:

> "He desired to put the corpus beyond the reach of such legatees, so that they might have an assured income for life. *So he tried to put it beyond their power to dispose of the estate during their life.* While he gave an absolute power of appointment, he reserved to himself the naming of the line of descent, should they fail to exercise the power, and thus gave to appellant a vested remainder, subject to be defeated only by the exercise of the powers of appointment." (Italics ours.)

V.

There is no valid federal definition nor standard of general powers of appointment.

A.

(1) Neither Section 302(f) nor any other part of the revenue statute attempts to define a general power of appointment.

(a) The attempt to establish this definition and create a standard by promulgation of Regulation 80, is inoperative.

Treasury Regulation 80 (124) reads as follows:

> "*Ordinarily*, a general power is one to appoint any person or persons in the discretion of the donee of the power." (Italics ours.)

This regulation purports to give the definition of "general powers of appointment," but it applies only to cases "ordinarily" coming before the courts. In Webster's dictionary, the word "ordinarily" is said to mean "customarily" or "usually." By its terms, then, it is clear that the regulation does not purport to apply to *all* cases coming within its scope. No rule is laid down by the regulation as to what proportion of the cases it will apply, and no rule is established therein for "unordinary" or "unusual" cases.

Regulation 80 cannot be held to fulfill the requirements of a statutory standard or definition. It is not even a valid administrative interpretation. Public statutes must be universal, according to Blackstone (25 R. C. L. 763). "A statute cannot be vague. It must be clear, certain, definite and specific." (59 C. J. 601.)

Great Lakes Hotel Co. v. *Commissioner*, 30 F. (2d) 1.

Regulation 37, at the time of its promulgation in 1919, was in identical language as Regulation 80 except that the word "ordinarily" was not in Regulation 37. The inclusion of that word in the regulation in 1924, must have been occasioned by the Commissioner's awareness of the impossibility of making a definite, certain and universal definition of a general power of appointment which would control every case, and construe properly the many and diverse provisions in the countless wills and trusts coming before the Courts for construction. But he did not cure the defect of indefiniteness and uncertainty and lack of universal application arising from the very words of the regulation.

(2) The decisions of various courts of appeals of the United States purporting to declare a general usage or common law definition of general powers of appointment, followed by the Circuit Court of Appeals in the instant case, are not authority in this case.

Those cases are:

Johnstone v. *Comm'r.*, 76 Fed. 2d. 55 (Ninth Circuit).

Wear v. *Comm'r.*, 65 Fed. 2d, 665 (Third Circuit).

Lee v. *Comm'r.*, 57 Fed. 2d, 399 (Dist. Col.).

Stratton v. *U. S.*, 50, Fed. 2d, 48 (First Circuit).

Fidelity-Philadelphia Trust Co. v. *McCaughn*, 34 Fed. 2d, 600 (Third Circuit).

They are not authority because there is no common law of the United States. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78.

All those decisions attempt to give a definition of "general powers of appointment." They are all based upon

either state decisions or textbooks, which announce the "general usage" or common law.

In *Erie R. Co.* v. *Tompkins, supra,* this Court overruled *Swift* v. *Tyson,* 16 Pet. 1, 18, which held that federal courts were "free to exercise an independent judgment as to what the common law of the State is—or should be." The Court in *Erie* v. *Tompkins* further declared (p. 71): "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, * * *. And no clause in the Constitution purports to confer such a power upon the federal courts."

VI.

The Circuit Court of Appeals erred in not holding as retroactive and void the Revenue Act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment by the decedent as donee.

Isaac Stephenson's will was signed June 15, 1916. His deed of trust was executed May 12, 1917. The first federal revenue act providing for the inclusion, for estate tax purposes, in the gross estate of decedent, of the value of property passing under the exercise of a general power of appointment, became a law in February, 1919.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its discretionary power of review by writ of certiorari, under the

circumstances and for the reasons stated in the petition and argument; that the petition should be granted in the interest of petitioner, the public, and the prompt and proper administration of justice.

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